Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45

COMMENTS OF GE AMERICAN COMMUNICATIONS, INC. ON THE RECOMMENDED DECISION OF THE JOINT BOARD

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SUMMARY

GE American Communications, Inc. ("GE Americom") supports the Joint Board's recommendation to align the class of mandatory universal service contributors with the approach used in the context of the Telecommunications Relay Service ("TRS") fund. This approach would reach common carrier satellite service but not private contracts for satellite space segment. This approach is consistent with the text and legislative history of the Telecommunications Act of 1996, as well as with the recommendation of the Joint Board, and harmonizes with the public interest rationale for reform of the universal service support mechanism. GE Americom also submits that carriers should be allowed to pass through universal service support costs to their customers, and that the Commission should protect the confidentiality of information about carriers' revenues.

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INTRODUCTION

GE American Communications, Inc. ("GE Americom") submits the following comments concerning the Federal-State Joint Board's Recommended Decision on universal service. 1/ GE Americom is one of the country's leading operators of fixed satellites. GE Americom launched its first satellite in 1975, and now has 12 single band or hybrid C and Ku-band satellites in service, and others under construction. We have applications pending for new satellite authorizations in the Extended Ku and Ka-band. We also are the majority owner of GE Starsys, a non-voice, non-geostationary ("NVNG") satellite operator.

GE Americom supports the Joint Board's recommendation that the Commission adopt rules that align the class of mandatory contributors with the approach used in the context of the Telecommunications Relay Service ("TRS")

1/ Public Notice, DA 96-1891 (released Nov. 18, 1996); Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Order (Com. Car. Bur., released Dec. 11, 1996).

fund. 2/ We agree that this approach is administratively simple and consistent with the language and intent of the Telecommunications Act of 1996. We agree that when firms provide common carrier services, they should pay both TRS and universal service support on revenues received from such services, whether those common carrier services are provided via satellite, terrestrially, or both.

Our primary purpose here is to clarify that under the Telecommunications Act the universal service obligation does not attach to the provision of space segment on a private contract basis. As the Commission is aware, the vast majority of GE Americom's space segment is used for the point-to-multipoint transmission of video programming to cable headends, broadcast facilities, and direct-to-home. Customers use our satellite space segment under long term contracts, often for the life of the satellite. Customers then obtain their own uplinking, downlinking, and other terrestrial requirements to interface with the space segment.

The special circumstances attendant to satellite operators are recognized in the Telecommunications Act itself. The overall amount of satellite space segment revenue is very small in the context of telecommunications-related revenues as a whole, so this issue is not material to the universal service fund or other parties. In contrast, however, the potential impact of ambiguity and misunderstanding in this area could be very serious for the U.S. satellite industry.

2/ Federal State Joint Board on Universal Service, CC Docket No. 96-45, Recommended Decision, FCC 96J-3 (Joint Board, released Nov. 8, 1996) ("Recommended Decision" or "RD"), ¶ 786.

I. THE COMMISSION SHOULD ADOPT THE JOINT BOARD'S RECOMMENDATION TO USE THE TRS APPROACH WITH RESPECT TO CONTRIBUTION.

The Joint Board recommends "adoption of the TRS approach" when determining contribution to the universal service fund. The Board concludes that this approach is consistent with the Telecommunications Act and administratively convenient. More specifically, the Board recommends that carriers should contribute "to the extent that these entities are considered 'telecommunications carriers' providing 'interstate telecommunications services' . . ." 3/

GE Americom supports this conclusion, which tracks the language of the Telecommunications Act and recognizes that the Act did not intend non-common carrier activity to be subject to the contribution requirement. Section 254(d) expressly states that a "telecommunications carrier that provides interstate telecommunications services shall" contribute to universal service. 4/ The offering of satellite space segment clearly does not fall into this category because the satellite operator is neither a "telecommunications carrier" nor a provider of "telecommunications services."

This conclusion is clear when the plain language of the Act is parsed. Section 3(44) defines a "telecommunications carrier" as "any provider of telecommunications services." 5/ In turn, Section 3(46) defines "telecommunications service" as "the

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3/ RD, ¶¶ 786-87.

4/ 47 U.S.C. § 254(d).

5/ 47 U.S.C. § 153(44). Thus, there is no inconsistency between the statutory principle that "[a]ll providers of telecommunications services" should contribute to support universal service, 47 U.S.C. 254(b)(4), and the directive that "[e]very

offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 6/ The Commission and the courts have a long and established jurisprudence of distinguishing between telecommunications providers that offer service "to the public" and those that do not. Before the enactment of the Telecommunications Act, a provider that offered service "to the public, or to such classes of users as to be effectively available directly to the public" -- or, to use an older, but equivalent, formulation, "undertakes to carry for all people indifferently" -- was deemed a "common carrier." 7/ By contrast, a provider "will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal." 8/

A satellite operator contracting to allow selected customers the use of space segment is not making an offering of telecommunications "directly to the public" as

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telecommunications carrier" contribute, § 254(d), because "providers of telecommunications services" are defined as synonymous with "telecommunications carriers."

6/ 47 U.S.C. § 153(46).

7/ National Ass'n of Regulatory Utility Comm'rs v. FCC, 525 F.2d 630, 641 & n.58 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) (NARUC I) (citing cases, including Supreme Court precedent dating as far back as 1916). See also National Ass'n of Regulatory Utility Comm'rs v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976) (NARUC II).

8/ NARUC I, 525 F.2d at 641 & nn.59-60. The 1996 Act's inclusion of services offered to "such classes of users as to be effectively available directly to the public" in the definition of "telecommunications service" is consistent with the pre-existing case law. For example: "This does not mean a given carrier's services must practically be available to the entire public. One may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population." NARUC I, 525 F.2d at 641.

required by Section 3(46). 9/ The Telecommunications Act is consistent with the long-standing industry practice of entering into private contracts for satellite space segment. In the Transponder Sales Decision, the Commission decided that the public interest favors allowing domestic satellite operators to sell transponder capacity, and that such sales do not constitute common carriage. 10/ The Commission recognized that the satellite business uniquely involves large up-front capital expenses and substantial risk for both operators and customers who depend on the availability of space segment. Long-term relationships between customers and satellite operators reduce these risks by permitting increased facilities planning and greater supply certainty on all sides. Furthermore, satellites require special coordination of spectrum usage among customers and the operator. As a business matter, customers benefit from sharing satellite capacity with similar users (e.g., cable program services on the same satellite). And as a technical matter, satellite operators must coordinate the ability of different users to transmit different types of communications (e.g., video, data, etc.) among transponders on the same satellite or adjacent satellites.

The D.C. Circuit affirmed the Commission's decision to allow non-common carrier contracts for space segment nearly 15 years ago, 11/ and this treatment is not upset by the Act. Congress incorporated this historic jurisprudence into the

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9/ 47 U.S.C. § 153(46).

10/ See Domestic Fixed Satellite Transponder Sales, 90 FCC 2d 1238 (1982) ("Transponder Sales Decision"), aff'd sub nom. Wold Communications Inc. v. FCC, 735 F.2d 1435 (D.C. Cir. 1984). In particular, see 90 FCC 2d at 1255-57, ¶¶ 42-45 (analyzing non-common carrier nature of transponder sales).

11/ Wold Communications Inc. v. FCC, 735 F.2d 1435 (D.C. Cir. 1984).

definitions of "telecommunications carrier" and "telecommunications service." The legislative history supports this analysis. As the Joint Board recognized, "Congress noted this distinction [between 'telecommunications carriers' and 'other providers of telecommunications'] when it stated that an entity can offer telecommunications on a private-service basis without incurring obligations as a common carrier." 12/ And in its discussion of the provision of the Senate bill that was the predecessor of Section 254(d), the Conference Report specifically refers to "private telecommunications providers" as an example of entities that may be considered "any other telecommunications provider." 13/

The Joint Board's recommendation to conform universal service support to the TRS methodology is consistent with this analysis. When satellite facilities are used to provide an "interstate telecommunications service" directly to the public, contribution obligations attach. But contribution is not warranted when a satellite operator provides space segment under private contracts.

The Joint Board's recommendation also is consistent with the rationale for Section 254. Congress adopted Section 254 in order to reform the existing universal service support system, and thereby facilitate local telephone competition. Universal service already is supported by incumbent LECs and IXCs today, albeit under a structure where subsidies are not clearly identified and competitive access to those subsidies is not possible. Section 254 aims to make universal service

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12/ RD, ¶ 792 (citing Jt. Statement of Managers, S. Conf. Rept. No. 104-230, 104th Cong., 2nd Sess. 115 (1996) ("Conference Report")).
13/ Conference Report at 129.

support competitively neutral, both with respect to funding and distribution, to facilitate local exchange competition. The goal is to rationalize the existing system and include carriers that potentially could compete with incumbent LECs to provide supported services, as well as other carriers that benefit from universal service support. 14/ Satellite space segment operators, however, do not provide local services and have no relationship to the universal service support system. There is thus no public interest rationale for imposing support obligations on them.

Satellite operators differ from mandatory contributors in other material ways. First, for example, satellite operators do not benefit from the positive externalities created by universal service. Carriers that interconnect with the public switched telephone network benefit from universal service because it increases the number of telephone subscribers who may place or receive calls over those carriers' networks. In contrast, universal service neither enhances the value of a satellite operators' spacecraft nor the ability of others to use that raw space segment.

Second, the long term nature of space segment contracts also is distinguishable from the services that will be subject to universal service support. LECs and IXCs will be able to accommodate themselves to the new support system with relatively modest changes to their rates, implemented easily because the vast majority of their services do not involve long-term fixed rates. In contrast, satellite

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14/ GE Americom recognizes that the universal service fund also includes new policy goals related to support for certain educational and health care purposes. However, most of the universal service support relates to local telephony.

operators would see only a large increase in their costs, costs that would have to be recovered as possible in the face of long term contracts with customers that do not anticipate such charges. As discussed below, the impact of mandatory contributions would be particularly egregious if satellite operators do not have a clear right to flow through these charges to customers notwithstanding other provisions in their contracts.

Third, it is relevant that customers use satellite space segment heavily for video program distribution. By limiting contribution to common carrier services, the Act avoids distorting competition in the provision of video services, including the direct-to-home market. GE Americom assumes that cable operators will not be required to make contributions based on revenues they receive from video program distribution. The Act ensures that the same will be true for satellite-based competition, whether over direct broadcast satellites or fixed satellites like those operated by GE Americom. The Act provides that none of these services should contribute to universal service. 15/

Finally, the Act's treatment of space segment avoids distortion of competition between US firms and foreign satellites. The "DISCO II" rulemaking 16/ and

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15/ At the least, the universal service rules cannot impose support obligations on satellite operators such as GE Americom, that make space segment available on a long term basis to direct-to-home programmers, that do not apply to vertically integrated DBS providers where the satellite operator and programmer are affiliated. Any discrimination in the respective universal service burden would create artificial market distortions that could affect video competition available to the public.

16/ Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in

related trade developments anticipate that in the future US satellites will compete directly with foreign satellites in both the domestic and international market. Foreign satellite operators will not be subject to a universal obligation. Under the Act, U.S. operators will be on an equal footing in this regard when they sell space segment.

For all of these reasons, the Commission should affirm the Joint Board's recommendation that universal service rules align the class of mandatory contributors with the approach used in the context of the TRS fund. That result is mandated by the Telecommunications Act, and consistent with the public interest.

II. TELECOMMUNICATIONS CARRIERS MUST BE ALLOWED TO PASS THROUGH UNIVERSAL SERVICE SUPPORT COSTS TO THEIR CUSTOMERS

GE Americom also separately provides certain common carrier telecommunications, albeit to a lesser extent. We understand that such services will be subject to the contribution requirements. This is acceptable so long as the Commission makes clear that we will be able to flow those new charges through to our customers.

The Joint Board stated that "carriers are permitted under section 254 to pass through to users of unbundled elements an equitable and nondiscriminatory portion of their universal service obligation." 17/ The Commission should clarify that this

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the United States, IB Docket No. 96-111, Notice of Proposed Rulemaking, FCC 96-210 (released May 14, 1996).

17/ RD, ¶ 808.

principle applies generally to all telecommunications services that carriers offer, and not only to unbundled network elements.

In particular, it is crucial that the Commission expressly state that carriers may modify long-term agreements to the extent necessary to recover universal service contributions. A newly mandated contribution to support universal service, like a regulatory fee, is a factor that is clearly beyond a carrier's control. 18/ Thus, the Commission should explicitly state that under the Mobile-Sierra doctrine, the requirement to contribute to the support mechanism constitutes "substantial cause" that would provide a "public interest" justification for the carrier's filing tariff changes, or changing its contracts with carriers or with other customers, to reflect the mandatory contributions in its rates. 19/

III. CONFIDENTIAL INFORMATION ABOUT TELECOMMUNICATIONS CARRIERS' REVENUES MUST BE PROTECTED

The Joint Board recommended the selection of a neutral, third-party administrator, subject to the oversight of a universal service advisory board, to collect and distribute funds in the universal service support mechanism. In order to

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18/ Cf. Cf. Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786, 6807 (1990), recon., 6 FCC Rcd 2637 (1991), aff'd sub nom. National Rural Tel. Ass'n v. FCC, 988 F.2d 174 (D.C. Cir. 1993).

19/ United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956); FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956); see also MCI Telecommunications Corp. v. FCC, 665 F.2d 1300 (D.C. Cir. 1981), appeal after remand, RCA Global Communications, Inc. v. FCC, 717 F.2d 1429 (D.C. Cir. 1983); RCA Americom Communications, Inc., 86 FCC 2d 1197, 1199-1200 (1981), aff'd in pertinent part on remand, 94 FCC 2d 1338, 1340 (1983); ACC Long Distance Corp. v. Yankee Microwave, Inc., 10 FCC Rcd 654 (1995).

assess each carrier's contribution, such an administrator will need to collect information about the carrier's gross revenues, less payments to other carriers. To the extent that GE Americom may be a contributor with regard to any portion of its revenues, we respectfully submit that the administrator should be required to keep such revenue information confidential. 20/ Such competitively sensitive information, if made public, could damage a carrier commercially, and there is no legitimate reason for any party other than the administrator to be able to obtain specific revenue data about a specific non-dominant carrier. To the extent that the administrator is considered a government agency for purposes of the Freedom of Information Act, information about a carrier's revenues from telecommunications services qualifies for the "trade secrets and commercial or financial information" exemption from that Act. 21/

20/ Cf. 47 C.F.R. § 64.604(c)(4)(ii)(I) (TRS fund administrator required to keep confidential all data obtained from contributors, and not allowed to disclose or to use such data except for purposes of administering the fund).
21/ 5 U.S.C. § 552(b)(4).

CONCLUSION

For the foregoing reasons, GE Americom respectfully requests that the Commission affirm and clarify the Recommended Decision in the manner discussed above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, hereby certify that on this 19th day of December, I caused to be served by hand delivery, copies of the foreging Comments of GE American Communications, Inc., addressed to the following:

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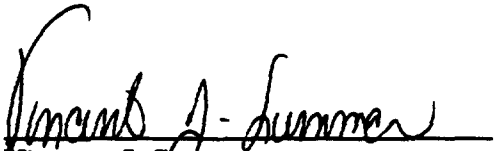

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